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## Tribute to James C. Nelson

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# TRIBUTE

## TRIBUTE TO JUSTICE JAMES C. NELSON

The *Montana Law Review* dedicates the current issue to the Honorable James C. Nelson, Justice of the Montana Supreme Court. The editors recognize and thank Justice Nelson for his participation and enthusiastic help in organizing the 2006 Honorable James R. Browning Symposium, *The Right to Privacy*.<sup>1</sup> The *Review* also thanks Justice Nelson on behalf of students of The University of Montana School of Law for his frequent visits to law school events, and for his intense and sincere interest in students' legal and ethical education. His semester teaching first-year criminal law while sitting as a supreme court justice demonstrates his remarkable dedication to Montana's law students.

This symposium issue presents the perfect opportunity to celebrate Justice Nelson. No jurist has been more influential in defining the contours of Montana's constitutional right to privacy.<sup>2</sup> And no jurist has been a more courageous and vigilant protector of ordinary Montanans' constitutional freedoms. The drafters of the Montana Constitution's Declaration of Rights not only specifically enumerated the individual rights Montana citizens consider sacred (including the right to privacy), but also sought to safeguard those rights from erosion by political forces and advancing technologies.<sup>3</sup> Justice Nelson and his colleagues on the court have

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1. U. of Mont. Sch. of L. (Oct. 11–13, 2006).

2. "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." Mont. Const. art. II, § 10.

3. *Montana Constitutional Convention, 1971–1972* vol. 5, 1681 (Margaret S. Warden et al. eds., Mont. Legis. 1981). See also *Dorwart v. Caraway*, 58 P.3d 128, 141 (Mont. 2002) (Trieweller, J.) ("[T]he authors of our Constitution . . . went to great and conspicuous lengths to preserve [the right to privacy] in the face of what they correctly anticipated would be increasing political pressure and the developing technological ability to erode it."); *Armstrong v. State*, 989 P.2d 364, 382 (Mont. 1999) (Nelson, J.) ("[N]or may the state infringe individual liberty and personal autonomy because of majoritarian demands . . .");

often declined to follow other state and federal courts' interpretations of privacy, recognizing that Montanans enjoy greater privacy rights than are recognized by other states or by the federal government.<sup>4</sup> Montana's jurisprudence of privacy is unique.

The right to privacy has been called the "right to be let alone."<sup>5</sup> Montana's emphasis on that tradition of personal privacy is sometimes mischaracterized as simply hostility to government, exemplified by newspaper headlines spotlighting misfits and fringe-groups.<sup>6</sup> To the contrary, Montana's privacy tradition is rooted in the noble values of tolerance and respect. Historian K. Ross Toole explained that "because Montanans are so few and the land is so large . . . , the Montanan is unusually mobile, unusually informed about what his neighbors are doing, and . . . unusually tolerant."<sup>7</sup> Or, as one Montana judge bluntly put it, "Montanans generally mind their own business"—"a rule . . . [that] does not need to be supported by reference to fancy law review articles."<sup>8</sup>

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Larry M. Ellison & Dennis NettikSimmons, *Right of Privacy*, 48 Mont. L. Rev. 1, 11, 27–28 (1987); William C. Rava, Student Author, *Toward a Historical Understanding of Montana's Privacy Provision*, 61 Albany L. Rev. 1681, 1711 (1998) ("Montana's right of privacy is an express countermajoritarian (or, more accurately, counter-legislative or governmental) procedural safeguard.").

4. *E.g. Dorwart*, 58 P.3d at 142 (Nelson & Trieweiler, JJ., specially concurring) ("[T]he greater guarantees of individual rights afforded by Montana's Constitution may be neither bounded nor frustrated by federal court decisions which, with seeming increasing frequency, are weakening similar protections of the federal constitution."); *Armstrong*, 989 P.2d at 367 (Nelson, J.); *Gryczan v. State*, 942 P.2d 112, 125 (Mont. 1997) (Nelson, J.); *State v. Siegal*, 934 P.2d 176, 192 (Mont. 1997) (Nelson, J.); see also *Trankel v. Dept. of Military Affairs*, 938 P.2d 614, 623 (Mont. 1997) (Trieweiler, J.) ("[Montana's constitutional right of full legal redress] leaves no room for erosion based on what federal courts or the courts of other states would do."); *State v. Schwarz*, 136 P.3d 989, 992 (Mont. 2006) (Leaphart, J.) ("[W]e now opt not to march in step with our sister states and federal courts on the issue."); *State v. Ellison*, 14 P.3d 456 (Mont. 2000) (Regnier, J.).

5. *E.g.* Thomas M. Cooley, *A Treatise on the Law of Torts* 29 (2d ed., Callaghan & Co. 1880); Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890); *Olmstead v. U.S.*, 227 U.S. 438, 478 (1928) (Brandeis, J., dissenting); *Welsh v. Roehm*, 241 P.2d 816, 819 (Mont. 1952); *Dorwart*, 58 P.3d at 141; James C. Nelson, *Keynote Address: The Right to Privacy*, 68 Mont. L. Rev. 257 (2007).

6. *E.g.* Tom Kenworthy, *Radical Reputation Bedevils Mont.*, USA Today A3 (Apr. 8, 2002) ("[T]he stereotype of Montana [is] as an incubator for weird zealots and anti-government movements.").

7. K. Ross Toole, *Montana: An Uncommon Land* 257 (U. of Okla. Press 1959) (quoted in Scott A. Fisk, Student Author, *The Last Best Place to Die: Physician-Assisted Suicide and Montana's Constitutional Right to Personal Autonomy Privacy*, 59 Mont. L. Rev. 301, 328 (1998) ("[Montanans'] uncommon tolerance lies at the heart of the express right to privacy in Montana.")).

8. Or. on Mots. for S.J. at 11, *Gryczan v. State*, 1996 Mont. Dist. Lexis 746 at \*\*12–13 (Mont. 1st Jud. Dist. Feb. 16, 1996) (Sherlock, J.) (quoted in Fisk, *supra* n. 7, at 328).

Despite potential political repercussions, Justice Nelson has consistently interpreted the privacy clause of the Montana Constitution in a manner consonant with the intention of Convention delegates: that Montanans may live their lives with a baseline measure of freedom and respect. As noted by a delegate to the Constitutional Convention, “the right to be let alone [may be] . . . the most important right of them all.”<sup>9</sup> Due in large part to Justice Nelson, Montanans’ right to privacy—to be let alone—is a fundamental right.<sup>10</sup> And the government’s infringement of that right is now a recognized cause of action for damages, giving the people a mechanism to hold the State accountable to the constitution’s promise.<sup>11</sup>

Justice Nelson’s jurisprudence has not gone unnoticed. Regarding the privacy of search and seizure, Nelson wrote the majority opinion in *State v. Siegal*, holding that police thermal imaging of a defendant’s outbuilding constituted a search that implicated privacy and search-and-seizure protections of the Montana Constitution.<sup>12</sup> Justice Nelson’s opinion was written when most federal courts considering the question—including the District of Montana<sup>13</sup>—had come to the opposite conclusion in relation to the federal Constitution.<sup>14</sup> Four years after *Siegal*, the U.S. Supreme Court reversed those lower federal courts. In *Kyllo v. U.S.*, Justice Scalia, writing for the Court, applied an analysis similar to Nelson’s, holding that people have a reasonable expectation of privacy in the thermal information emanating from their homes, an expectation that protects citizens from unreasonable government intrusion.<sup>15</sup>

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9. *Montana Constitutional Convention, 1971–1972* vol. 5, 1681 (Margaret S. Warden et al. eds., Mont. Legis. 1981).

10. *E.g. Gryczan v. State*, 942 P.2d 112, 122 (Mont. 1997); *Armstrong v. State*, 989 P.2d 364, 367 (Mont. 1999).

11. *Dorwart v. Caraway*, 58 P.3d 128, 138 (Mont. 2002); *id.* at 147–48 (Nelson & Trieweiler, JJ., specially concurring).

12. *State v. Siegal*, 934 P.2d 176, 183–84, 191–92 (Mont. 1997); Mont. Const. art. II, §§ 10, 11.

13. *U.S. v. Depew*, 992 F. Supp. 1209, 1212 (D. Mont. 1998), *aff’d*, 210 F.3d 1061 (9th Cir. 2000).

14. *E.g. U.S. v. Ishmael*, 48 F.3d 850 (5th Cir. 1995); *U.S. v. Myers*, 46 F.3d 668, 669–70 (7th Cir. 1995); *U.S. v. Pinson*, 24 F.3d 1056, 1058–59 (8th Cir. 1994); *U.S. v. Ford*, 34 F.3d 992, 995–97 (11th Cir. 1994); *Kyllo v. U.S.*, 190 F.3d 1041, 1047 (9th Cir. 1999), *rev’d*, 533 U.S. 27, 40 (2001).

15. *Kyllo*, 533 U.S. at 40 (citing U.S. Const. amend. IV). *Compare Siegal*, 934 P.2d at 191 (“[W]e conclude that persons have an actual (subjective) expectation of privacy in the heat signatures of activities [in their homes and enclosed structures] . . . . [T]his expectation is one which society in this State is willing to recognize as objectively reasonable.”)

Justice Nelson has perhaps most affected the State's privacy jurisprudence in the area of personal autonomy.<sup>16</sup> As a result of cases like *Armstrong v. State*<sup>17</sup> and *Gryczan v. State*<sup>18</sup>—both Nelson-authored opinions—Montana's right to privacy now more fully encompasses personal autonomy and decision-making. The *Armstrong* plaintiffs, including a physician's assistant, challenged a Montana statute requiring that all abortions be performed only by licensed physicians.<sup>19</sup> Arguing under the federal Constitution in federal court, the plaintiffs lost at the U.S. Supreme Court.<sup>20</sup>

In the plaintiffs' subsequent state constitutional challenge, the Montana Supreme Court held that the right to privacy enshrined in Montana's Constitution "broadly protects a woman's right of procreative autonomy—i.e., here, the right to seek and to obtain a specific lawful medical procedure, a pre-viability abortion, from a health care provider of her choice." Nelson, writing for the majority, held that the "right of procreative autonomy" includes the right to choose an appropriate healthcare provider on the basis of medical standards, not politics—even in the politically charged area of abortion.<sup>21</sup> Once again, Montana's constitutional right to privacy, as interpreted by Justice Nelson and his colleagues on the Montana Supreme Court, set Montanans' right to reproductive autonomy well above the federal high-water mark of *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, and far above the lower ebb enunciated recently in *Gonzales v. Carhart*.<sup>22</sup>

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with *Kyllo v. U.S.*, 533 U.S. at 40 ("Where . . . the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant.").

16. *Armstrong v. State*, 989 P.2d 364, 367 (Mont. 1999); *Gryczan v. State*, 942 P.2d 112, 125 (Mont. 1997).

17. *Armstrong*, 989 P.2d at 367.

18. *Gryczan*, 942 P.2d at 125.

19. Ch. 321, 1995 Mont. Laws § 2 (codified at Mont. Code Ann. § 50-20-109 (1995)) (superseded by Mont. Code Ann. § 50-20-109 (2005)).

20. *Armstrong v. Mazurek*, 906 F. Supp. 561 (D. Mont. 1995), *vacated*, 94 F.3d 566 (9th Cir. 1996), *rev'd*, 520 U.S. 968 (1997).

21. *Armstrong*, 989 P.2d at 367 (Mont. 1999).

22. *Roe v. Wade*, 410 U.S. 113, 164–65 (1973) (holding that a right to privacy includes a qualified right to choose an abortion); *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 873, 879 (1992) (upholding *Roe*, but allowing states to regulate pre-viability abortions when such regulations do not present an "undue burden" on the woman); *Gonzales v. Carhart*, 127 S. Ct. 1610, 1635–36 (2007) (upholding a federal ban on one type of abortion procedure).

In *Gryczan*, Justice Nelson, writing for the court's majority, held that "[t]he right of consenting adults, regardless of gender, to engage in private, non-commercial sexual conduct strikes at the very core of Montana's constitutional right of individual privacy" and that a state law criminalizing such conduct was unconstitutional.<sup>23</sup> The court noted that "consenting adults expect that neither the state nor their neighbors will be co-habitants of their bedrooms."<sup>24</sup> *Gryczan* was decided when the U.S. Supreme Court's *Bowers v. Hardwick* decision—upholding a similar Georgia "anti-sodomy" law—was still the federal law of the land.<sup>25</sup> Six years after *Gryczan*, the U.S. Supreme Court decided *Lawrence v. Texas*, which articulated an understanding of privacy closer to that emphasized by Justice Nelson in *Gryczan*.<sup>26</sup> Justice Kennedy's *Lawrence* opinion cited *Gryczan* among only a handful of state court cases.<sup>27</sup>

Justice Nelson also guarded the integrity of individuals' right to privacy in *Associated Press, Inc. v. Montana Department of Revenue*.<sup>28</sup> Concurring, Justice Nelson argued against state precedent that corporations also enjoy the constitutional right to privacy.<sup>29</sup> Highlighting the "individual" in Article II, section 10's "individual right of privacy," Justice Nelson argued that the right applies only to humans.<sup>30</sup> Three years later, the Montana Supreme Court unanimously adopted Nelson's *Associated Press* analysis.<sup>31</sup> That analysis is particularly important when courts must balance the right to privacy against the "right to know," another express constitutional guarantee that protects Montanans' right to see the inner workings of state and local governments, includ-

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23. *Gryczan*, 942 P.2d at 125.

24. *Id.* at 122.

25. *Bowers v. Hardwick*, 478 U.S. 186 (1986), overruled, *Lawrence v. Tex.*, 539 U.S. 558 (2003).

26. Compare *Gryczan* 942 P.2d at 126 ("[W]hile legislative enactments may reflect the will of the majority, and, arguably, may even respond to perceived societal notions of what is acceptable conduct in a moral sense, there are certain rights so fundamental that they will not be denied to a minority no matter how despised by society.") with *Lawrence*, 539 U.S. at 578 ("The State cannot demean [the plaintiff and his partner's] existence or control their destiny by making their private sexual conduct a crime.").

27. *Lawrence*, 539 U.S. at 570–71.

28. *Associated Press, Inc. v. Mont. Dept. of Revenue*, 4 P.3d 5, 13 (Mont. 2000) (Nelson & Leaphart, JJ., specially concurring).

29. *Mt. Sts. Tel. & Telegraph Co. v. Dept. of Pub. Serv. Reg.*, 634 P.2d 181 (Mont. 1981), overruled, *Great Falls Trib. v. Mont. Pub. Serv. Commn.*, 82 P.3d 876, 883 (Mont. 2003).

30. *Associated Press*, 4 P.3d at 13 (Nelson & Leaphart, JJ., specially concurring).

31. *Great Falls Trib.*, 82 P.3d at 883 (citing *Associated Press*, 4 P.3d at 14–21 (Nelson & Leaphart, JJ., specially concurring)).

ing their ability to examine documents and observe deliberations.<sup>32</sup>

Montanans hold a tight rein on the government when it comes to their privacy. The strong words of the constitutional text, the unambiguous history of the 1972 Montana Constitutional Convention, and the corpus of state constitutional case law provide citizens that control. Although strong, Montana's right to privacy is not absolute. Narrowly tailored legislation furthering a compelling state interest can trump the right to privacy.<sup>33</sup> The State's Constitution thus manifests practicality, another Montana trait born of scratching out a living in rough country.

Born in Moscow, Idaho, and a graduate of George Washington University Law School in Washington, D.C.,<sup>34</sup> Justice Nelson has experienced and contributed to Montana's ethos of tolerance, respect, and hard-nosed practicality in the fourteen years he served as Glacier County Attorney,<sup>35</sup> his nearly twenty years in private practice in Cut Bank,<sup>36</sup> his ten years as a member of the Montana delegation to the National Conference of Commissioners on Uniform State Laws,<sup>37</sup> and the past fourteen years since he was appointed to the Montana Supreme Court by Governor Marc Racicot.<sup>38</sup>

Because Justice Nelson is a vigilant and principled protector of the right to privacy, a steadfast advocate of The University of Montana School of Law and its students, and a valued and dependable friend to the *Montana Law Review*, we dedicate this issue to the Honorable James C. Nelson.

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32. Mont. Const. art. II, § 9. See e.g. *Associated Press*, 43 P.3d at 10–11 (majority); *T.L.S. v. Mont. Advocacy Program*, 144 P.3d 818, 824–25 (Mont. 2006).

33. Mont. Const. art. II, § 10.

34. *Montana Courts*, "Justice James C. Nelson", <http://www.montanacourts.org/supreme/bios/nelson.asp> (accessed June 11, 2007).

35. Michael Moore, *Justice Jim Nelson*, Missoulian (May 7, 2000) (available at <http://www.missoulian.com/articles/2000/05/07/export43227.txt>).

36. Associated Press, *Regnier Won't Seek Re-Election to Supreme Court; Nelson Will*, Missoulian (July 1, 2003) (available at <http://www.missoulian.com/articles/2003/07/01/mtracker/news/45judges.txt>).

37. Email from E. Edwin Eck, Dean, U. of Mont. Sch. of L. & delegate to Natl. Conf. Commrs. Unif. St. Ls., to Daniel Browder, Co-Editor-in-Chief, Mont. L. Rev., *Re: Justice Nelson* (June 7, 2007) (copy on file with *Montana Law Review*).

38. Jennifer McKee, *Nelson, Morris Capture High Court Seats*, Missoulian (Nov. 3, 2004) (available at <http://www.missoulian.com/articles/2004/11/03/news/mtrregional/news07.txt>).